

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-10504-JMD
Chapter 7

Richard Croteau,
Debtor

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Timothy P. Smith, Esq.
Chapter 7 Trustee

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

The Court has before it the motion of Timothy Smith, the Chapter 7 Trustee (the “Trustee”), to sell the bankruptcy estate’s interest in the Debtor’s real estate in Derry (the “Property”) to the Debtor for \$5,000. Doc. No. 24. Creditor Charles Lombardo (“Lombardo”) objects to the motion on the grounds that the Property is worth more than the amount stated in the motion. Doc. No. 26. The Court held a non-evidentiary hearing on the motion and the objection thereto at which the Debtor and his counsel, the Trustee, and Lombardo’s counsel appeared.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The Debtor filed a Chapter 7 bankruptcy petition on February 28, 2000. At that time he listed the Property in Schedule A as being worth \$98,000. At the first meeting of creditors, Lombardo appeared and indicated that the property was worth \$112,000. On June 8, 2001, the Trustee filed the instant motion to sell stating that the Property is worth \$98,000, that the Property is subject to a first mortgage in the amount of \$76,800, that the Debtor has claimed an exemption in the Property in the amount of \$5,895, and that the Debtor's one-half share of the equity totaled \$10,600. At the hearing, the Trustee further stated that a sale of the equity in the Property to the Debtor for \$5,000 is in the best interest of the estate because it avoids the cost of filing an adversary proceeding under 11 U.S.C. § 363(h), which would be required to sell the co-debtor's one-half interest in the Property, and it avoids the costs associated with selling the Property on the market (e.g., broker's commission and transfer taxes). Lombardo objects to the motion on the grounds that, according to a recent broker's price opinion he obtained, the Property is worth \$155,000 making the sale of the bankruptcy estate's interest in the Property for \$5,000 unreasonable. According to Lombardo, there is now \$39,100 in equity available for the bankruptcy estate and, accordingly, any sale to the Debtor should reflect this postpetition increase in equity.

III. DISCUSSION

The issue the Court must decide is whether the postpetition increase in equity in the Property constitutes property of the estate or property of the Debtor. Having reviewed the relevant case law, the Court concludes that any postpetition increase in equity in the Property constitutes property of the estate. Section 541(a)(6) of the Bankruptcy Code provides that the bankruptcy estate is comprised of "[p]roceeds, product, offspring, rents or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case." 11 U.S.C. § 541(a)(6). While there is a split of authority regarding whether postpetition appreciation belongs to the Chapter 7 trustee, it appears that a majority of courts hold that prior to abandonment the estate is entitled to

postpetition appreciation. See, e.g., Vu v. Kendall (In re Vu), 245 B.R. 644, 647-48 (B.A.P. 9th Cir. 2000) (“The Ninth Circuit has consistently held without limitation that, under § 541(a)(6), the estate is entitled to postpetition appreciation.”); Potter v. Drewes (In re Potter), 228 B.R. 422, 424 (B.A.P. 8th Cir. 1999) (“Except to the extent of the debtor’s potential exemption rights, post-petition appreciation in the value of property accrues for the benefit of the trustee.”); In re Bregni, 215 B.R. 850, 854 (Bankr. E.D. Mich. 1997); In re Paoletta, 85 B.R. 974, 977 (Bankr. E.D. Pa. 1988). See also In re Barbosa, 236 B.R. 540, 554 (Bankr. D. Mass. 1999) (“Because § 541(a)(6) makes the proceeds and profits of property of the estate also property of the estate, because the Property was property of the estate at the commencement of the case, and because the Debtors are in possession and control of the excess proceeds from the sale of the Property, the Court finds that if the Debtors were to convert their case to a case under Chapter 7 in good faith, a Chapter 7 Trustee would be able to obtain the excess proceeds for distribution to the creditors of the Debtors’ estate.”).

As the Eighth Circuit Bankruptcy Appellate Panel has explained, “[n]othing in [s]ection 541 suggests that the estate’s interest is anything less than the entire asset, including any changes in its value which might occur after the date of filing.” Potter, 228 B.R. at 424. “Because sale [of estate property] does not generally, if ever, occur simultaneously with formation of a bankruptcy estate, § 541(a)(6) mandates that the estate receive the value of the property at the time of the sale. This value may include appreciation or be enhanced by other circumstances creating equity which occur postpetition.” Paoletta, 85 B.R. at 977.¹

The Debtor argues that such a ruling by the Court will create an incentive for a Chapter 7 trustee to delay administration of the estate in order to create equity for the benefit of creditors. To the extent that

¹ The Court notes that in In re Page, 250 B.R. 465 (Bankr. D.N.H. 2000), Chief Judge Vaughn held that a Chapter 7 trustee was not entitled to postpetition appreciation in the value of real property. However, Page involved the application of 11 U.S.C. § 348(f) upon conversion of a Chapter 13 proceeding to Chapter 7 after confirmation of a Chapter 13 plan. This case was originally filed as a Chapter 7 proceeding and 11 U.S.C. § 348(f) does not apply.

this is a legitimate concern, debtors have a remedy: they can file a motion under 11 U.S.C. § 554(b) requesting that the Court order the trustee to abandon the property on the grounds that the property is of inconsequential value and benefit to the estate. See Bregni, 215 B.R. at 854; In re DeSoto, 181 B.R. 704, 711 (Bankr. D. Conn. 1995) (“Congress has provided debtors with the ability to compel a trustee to abandon property which is ‘of inconsequential value and benefit to the estate.’”); Paolella, 85 B.R. at 974.

IV. CONCLUSION AND ORDER

For these reasons, the Court concludes that any postpetition increase in the equity of the Property is property of the Debtor’s bankruptcy estate. The Court finds that the Trustee has not established that the proposed sale of the bankruptcy estate’s interest in the Property to the Debtor for \$5,000 is in the best interest of the estate. After further investigation, the Trustee may develop evidence which would support the proposed sale, or an alternate proposal. The Court notes that it has not made any determination regarding the value of the Property nor the applicability of the exception in 11 U.S.C. § 541(a)(6) with respect to “earnings from services performed by an individual debtor after the commencement of the case.”

Accordingly, it is hereby ORDERED that the Trustee’s motion to sell is **denied** without prejudice. This opinion and order constitutes the Court’s findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DONE and ORDERED this 19th day of July, 2001, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge